

REMARKS

In response to the Office Communication, applicant elects the species of Paragraph 7 of the Office Action of September 30, 2008, (Species A) a radiation energy probe including a column. The claims readable on the elected species are claims 32 and new claims 47 and 48.

Applicant also wishes to confirm the interview with the Examiner and the inventor on March 12, 2009. During the interview, the above election of species was discussed and possible claim amendments for claim 32 were also discussed in an attempt to distinguish over three patents referred to by the Examiner. The three patents are U.S. Patent Nos. 5,046,482, 6,042,266 and 6,203,193.

Of the three references, only the '266 patent appears to be relevant to the present invention. However, in the '266 patent, a preferred embodiment includes a sanitary barrier 70 which can pose a blockage to radiation energy as stated at column 11, lines 20-22, where it is stated "since the barrier 70 can never be a 100% transparent to radiant energy (and will generally exhibit some reflectivity characteristics)".

Further, as shown in Figure 4B of the patent, for example, the separation distance between probe 66 and the barrier 70 covering the distal end of passageway 56, appears to have a substantial width. In contrast, as now defined in

amended claim 32, a cross-section of the column is defined as being less than 3.0 mm.

Therefore, the claimed relationship of the cross-section of the column provides for a substantially smaller width of the column as compared to the '266 patent. Further, the claimed field of view of the column has been defined as being less than or equal to 5.0 mm. This feature is not found in the '266 patent. Although a particular width for the column does not appear to be set forth in the '266 patent, it appears from Figure 4A that the width of the passageway 56 is approximately one-third of the diameter of the probe. The probe is intended to fit into an ear canal with compression of its sidewalls. Typically, an ear canal may measure 16 mm across. If a greater width of the probe is required to seal the ear canal as shown in Figure 3A, it would be reasonable to assume that the probe has a diameter of greater than 25 mm at its end having passageway 56. This would make the passageway 56 have a diameter of greater than 8 mm.

Further the radiation emission detected by the sensor 66 in the '266 patent does not appear to be limited to less than 5 degrees. In contrast, in the present invention, a small source of radiation is emitted and measured through an open ended window having a field of view of less than five degrees.

Therefore, since the '266 patent is used for a different purpose, its structure does not require the structure as claimed for the present invention. The

structure of the present invention provides for receipt of all of the radiation energy from the brain tunnel. The radiation energy of the invention is received through an open window at an end of the column and having a sensor located at the opposite end of the column.

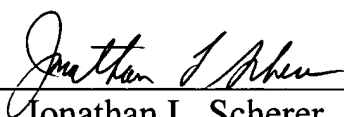
Accordingly, the present invention as now defined in amended claim 32 is distinguished over the prior art of record and the three references newly cited by the Examiner. If after reviewing the amended claims, the Examiner has any questions or suggestions for furthering prosecution of the captioned application, it is respectfully requested that the Examiner contact the undersigned attorney.

Based on the foregoing amendments and remarks, it is respectfully submitted that the present application should now be in condition for allowance. A Notice of Allowance is in order, and such favorable action and reconsideration are respectfully requested.

However, if after reviewing the above amendments and remarks, the Examiner has any questions or comments, he is cordially invited to contact the undersigned attorneys.

Respectfully submitted,

JACOBSON HOLMAN PLLC

By: 
Jonathan L. Scherer
Reg. No. 29,851

400 Seventh Street, N.W.
Washington, D.C. 20004-2201
(202) 638-6666
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JLS:ms